PERTUBUHAN KESELAMATAN SOSIAL

v.

CHIN CHEE KUANG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CIVIL PROCEEDINGS NO. D1-23-2907-88]
10 JUNE 1991

CIVIL PROCEDURE: *Summary judgment - Triable issues - Rules of the High Court 1980, O. 14.*

SECURITIES: *Option to repurchase shares - Whether option properly exercised - Whether market misled - Violation of statute - Illegal transaction - Whether moneylending transaction - Sham - Securities Industry Act 1983, s. 84.*

The plaintiff, a body corporate, claimed that by a written agreement dated 26 September 1985 the plaintiff purchased from the 1st defendant D1, 3 million shares in First Allied Corporation Bhd. (FACB) and that the purchase price was duly paid.

Clause 9 of the agreement (CL9) stated that after the 1st anniversary date of the agreement, the plaintiff may exercise the option to repurchase all or part of the sale shares from D1 at a price of RM1.80 per sale share or such adjusted repurchase price and interest thereon, which is the base lending rate of any commercial bank selected by the plaintiff plus 1½%.

It was contended by the plaintiff that they had exercised the option requiring D1 to repurchase the shares but D1 failed to do so.

As against the 2nd and 3rd defendants, D2 and D3 the plaintiff claimed under a guarantee executed by them to perform the agreement should D1 fail to do so.

The defendants denied that the option had been exercised and further averred that the agreement referred to was null and void and incapable of enforcement by the plaintiff.

The 3 main issues were:

(1) whether the option in Clause 9 had been properly exercised.

(2) whether 3 other similar transactions which took place involving FACB shares by 3 other government agencies with D1 with similar options to repurchase may have violated s. 84 of the Securities Industries Act 1983 (the 1983 Act).

(3) whether this transaction was a sham to defeat the provisions of the Moneylenders Act of 1951.

The plaintiff's application to sign final judgment under O. 14 Rules of the High Court 1980 was refused by the Senior Assistant Registrar. This was the appeal against the said decision.

Held:

[1] The defendants had succeeded in raising triable issues as:

(i) On reading the letter dated 13 August 1986 which purported to be the notice exercising the option in cl. 9 of the agreement, it was clear that it was merely a letter informing the defendant of the plaintiff's intention to exercise the option it did not appear to be a notice exercising the option.

(ii) The defendant was relying on the 2nd limb of s. 84 of the 1984 Act which covers misleading appearance with respect to the market, not only on a stock market, of any securities. The Court may need to examine the 3 other similar transactions to see whether s. 84 of the 1983 Act may have been violated and if so the Court ought not to lend a hand to an illegal transaction, and this in itself constitutes a defence.

(iii) The question raised by the defendant as to whether the transaction in question was an investment or a moneylending transaction clothed as an investment could only be decided after proper evidence and proper arguments on the law had been canvassed.

[2] The whole transaction smacks of a sham dealing and the claim ought to be investigated further.

[Appeal dismissed with costs.]

Cases referred to:
Jacobs v. Booth's Distillery Co. [1901] 85 LT 262 HL ***(cit)***
Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282 ***(cit)***
Miles v. Bull [1968] 3 WLR 1090 ***(cons)***
Harrison v. Bottenheim [1878] 26 WLR 362 ***(cit)***
Concentrate Engineering Pte. Ltd. v. United Malayan Banking Bhd. [1990] 3 MLJ 1 ***(cit)***
Marina Sports Ltd. v. Alliance Richfield Pte. Ltd. [1990] 3 MLJ 5 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 3(1)
Securities Industry Act 1983, s. 84

Other source referred to:
Mallal's Supreme Court Practice, 2nd Edn.

For the plaintiff/appellant - K. Shanti Mogan; M/s. Shearn & Delamore
For the defendant/respondent - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Shaik Daud Ismail J:

This is an appeal from the decision of the Senior Assistant Registrar refusing to sign final judgment against the defendants under O. 14, Rules of the High Court. A writ of summons was issued on 22 November 1988 and all three defendants entered appearance on 10 December 1988.

In the statement of claims, the plaintiff a body corporate, established under and pursuant to the Employees Social Security Act 1969, claimed that by a written agreement dated 26 September 1985, the plaintiff purchased 3,000,000 shares in First Allied Corporation Berhad (FACB) from 1st defendant for a sum of RM5.4 million and this sum was duly paid on 1 October 1985. One of the terms of the agreement dated 26 September 1985 is Clause 9 which in fact is the main subject matter of the summons in chambers and this appeal. Clause 9 of the agreement states that after the first anniversary date of the agreement the buyer (that is, the plaintiff) may exercise the option on giving thirty days notice to the seller (that is, the 1st defendant) to repurchase all or part of the sale shares from the defendant at a price of RM1.80 per sale share or such adjusted repurchase price as the case may be and interest thereon, which is the base lending rate of any commercial bank selected by the plaintiff plus one and a half percent (1½%).

The plaintiff contended in their statement claim that by a letter dated 13 August 1986 and pursuant to its rights under Clause 9 of the agreement, they exercised the option requiring the 1st defendant to repurchase the said shares and despite several demands the 1st defendant has failed or neglected to comply with the said agreement and pay the plaintiff the sum of RM5,400,000 and interest thereon at the rate of 13.75 per cent per annum from 26 September 1985.

As against the 2nd and 3rd defendants, the plaintiff claimed under a guarantee executed by them to perform the agreement should the 1st defendant default.

All the defendants filed their statement of defence on 13 December 1989 in which they denied that the option had been exercised and further averred that the agreement referred to is null and void and incapable of enforcement by the plaintiff. From the statement of defence and the affidavits filed the defendants of course, need not prove that they will succeed with their defence but need only raise triable issues and if they succeed in any one of those issues raised they ought to be given leave to defend. The issues raised by the defendants are:

1. Procedural and substantive irregularities in making the alleged investment by the plaintiff;
2. That there were no resolution of the governing body authorising the alleged investment;
3. The alleged investment did not comply with the Act governing the plaintiff body;
4. The entire alleged investment was in fact a sham to defeat the provisions of the Moneylenders Act 1951;
5. Agreement of 6 September 1985 is a circular contract whereby despite the sale and purchase the beneficial ownership of the shares always remained with the 1st defendant;
6. That the agreement dated 26 September 1985 violated s. 84 of the Securities Industries Act 1983;
7. The Foreign Investment Committee (FIC) had not approved the repurchase of the shares;
8. Clause 9 does not in fact grant an option on the plaintiff but merely governs the exercise of such an option;
9. The 2nd & 3rd defendants under their guarantee are not liable for monetary claim but only to cause the repurchase of the shares by 1st defendant.

As I said earlier if the defendants succeed in any one of the above issues raised then they ought to be allowed to defend. As such I will deal with three main issues raised. First of all the contention by the defence that the option in Clause 9 had in fact not been properly exercised. Now by Clause 9 the option may be exercised after the first anniversary of the agreement. Agreement is dated 26 September 1985 and as such the option can only be exercised after 26 September 1986 not before. If an attempt was made to exercise the option prior to this date then the option cannot be said to have been exercised. It is the contention of learned Counsel for the defence that the letter dated 13 August 1986 by which the plaintiff claimed to have exercised the option is in fact not the letter exercising the option. The letter is dated 13 August 1986 whereas the anniversary date of the agreement is 26 September 1986 as such the letter of 13 August 1986 cannot be one to exercise the option. The issue therefore is whether the option had in fact been exercised, and this is one issue which ought to be tried. The learned Counsel for plaintiff contends that although the letter purporting to

exercise the option is dated 13 August 1986, that is, prior to the date stipulated in Clause 9, the defendant entered into negotiations with plaintiff based on this letter and as such had conceded that the option had in fact been exercised.

Secondly the defendant contends that apart from this transaction three other similar transactions took place involving FACB shares by three other government agencies namely Sports Toto, Markuwasa and Employees Provident Fund with the 1st defendant with similar options to repurchase. These transactions may have violated s. 84 of the Securities Industries Act 1983 (Act 280). Section 84 states as follows:

> (1). A person shall not create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in Malaysia or a false or misleading appearance with respect to the market for, or the price of, any such securities.

It is the defendant's contention that the transaction fell foul of s. 84 above. This sale he claimed fitted in with s. 84 as it is an attempt at price maintenance, since the price had been fixed at RM1.80 without regard to the proper market value of the shares. As such he contends whether the transaction violated s. 84 of Act 280 is a triable issue. Plaintiff on the other hand contends that there is no such violation as this was not an open market sale but a private sale and the phrase "such securities" in s. 84 must denote to the securities in the stock exchange only. With respect the second limb of s. 84 is not confined only to the stock market as it talked of "false or misleading appearance with respect to the market".

Thirdly the defendant contends that this whole transaction was a sham to defeat the provisions of the Moneylenders Act 42 of 1951. At the time of the transaction Act 42 of 1951 was in force and applicable and accordingly the definition of moneylender in this Act is applicable. It is the defendants contention that the agreement in question provides not only for first defendant to repurchase the shares but also had to pay interest at the rate of 1½% above the base lending rate of a commercial bank. As such it is the contention of the defendant that from this the only inference is that this was a moneylending transaction and if so the transaction had violated the provisions of the Moneylenders Act 1951. This, contends the defendant is also an issue to be tried, and defendant ought to be given the opportunity to prove this.

It is clear the provision for summary judgment under O. 14 is intended to apply to cases which are virtually uncontested or uncontestable. As stated in *Mallal's Supreme Court Practice* 2nd Edn., p. 87:

> There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it is not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. Per Halsbury LC in *Jacobs v. Booth's Distillery Co.* [1901] 85 LT 262 HL.

The Federal Court in *Citibank N.A. v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 held that where all the issues are clear summary judgment will be given. The duty of the defendant in an O. 14 application is clear. He may raise technical issues or on merits. On merits he need only show that he has a good defence to the claim or that difficult points of law are involved, or there is a dispute as to the fact which ought to be tried or any other circumstances showing a reasonable *bona fide* defence. Once the defendant succeeded in showing any of these matters he ought not to be shut out and ought to be allowed to defend the claim.

In O. 14 r. 3(1) there appear to be two limbs and if the Court is satisfied that any one of them had been raised, the defendant ought to be given leave to defend. The rule talks of:

> ...there is an issue or question in dispute which ought to be tried or that there ought for **some other reason** to be a trial of the claim.

In *Miles v. Bull* [1968] 3 WLR 1090 the defendant and her husband separated, and the husband thereafter sold the matrimonial home, in which the defendant was still living, to the plaintiff. The plaintiff then commenced an action for possession and applied for summary judgment. The master gave unconditional leave to defend. On appeal, Megarry J, in giving defendant leave to defend, held that the only defence available to the defendant was that the sale was a sham but that on the evidence there was no arguable case that the sale was a sham. His Lordship then turned to question whether leave should be given on some other ground. As stated above the words "for some other reason" also appears in the English rule as in our r. 3(1). On this his Lordship at p. 1095 said:

> Under rr. 3 and 4 of the present O. 14, the defendant can obtain leave to defend if (and I read r. 3(1)) the defendant satisfied the Court 'that there is an issue or question in dispute which ought to be tried or, that there ought for some other reasons to be a trial.' These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination of those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfied the Court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.

Later on his Lordship added:

> The words 'there ought for some other reason to be a trial' seem to me to give the Court adequate powers to confine O. 14 to being a good servant and prevent it from being a bad master.

Further down:

> I also bear in mind what Bramwell LJ said in *Harrison v. Bottenheim* [1878] 26 WLR 362. Even on the old wording of O. 14:
>
> > ...though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O. 14, and should not be pursued without his being allowed to defend.

Miles v. Bull was followed in *Concentrate Engineering Pte. Ltd. v. United Malaysian Banking Berhad* [1990] 3 MLJ 1.

In *Marina Sports Ltd. v. Alliance Richfield Pte. Ltd.* [1990] 3 MLJ 5 in an application for summary judgment the Court held that:

> In an application under O. 14, it is not for the Court to decide on the final merits of the issue, but only to provide an opportunity for the defendants to put a defence if the Court is satisfied that there is an issue which should be tried.

After hearing both parties and considering all the points raised I am of the opinion that the defendant had succeeded in raising triable issues, in at least the three main issues I elaborated above. The first is on the question of whether the plaintiff had in fact exercised its option as per agreement of 26 September 1985. On reading the letter dated 13 August 1986 which

purported to be the notice exercising the option as in Clause 9 of the agreement, it is clear that it was merely a letter informing the defendant of the plaintiff's intention to exercise and it does not appear to be a notice exercising the option.

The second is the question of whether this transaction violated s. 84 of the Securities Act 1983. The defendant is relying on the second limb of s. 84 which covers misleading appearance with respect to the market not only on a stock market of any securities. In this respect the Court may need to examine the three other similar transactions mentioned by defendant in his affidavit to see whether s. 84 may have been violated and if so the Court ought not to lend a hand to an illegal transaction, and this itself constitutes a defence.

Thirdly whether the transaction also violated the provisions of the Moneylender's Act 1951 (Act 42 of 1951). The question the defendant had posed is whether this transaction was an investment or a moneylending transaction clothed as an investment. To my mind there are triable issues which can be decided after proper evidence and proper arguments on the law had been canvassed. Apart from these I am of the view that the whole transaction smacks of a sham dealing and the claim ought to be investigated further and plaintiff be put to strict proof of their claim. For these reasons I confirm the Senior Assistant Registrar's order and dismissed the appeal with costs.

Also found at [1991] 3 CLJ 2183